(3)

CASE NUMBER 84-231

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN D. HOOPER AND MARY N. HOOPER,
APPELLANTS

VS.

BERNALILLO COUNTY ASSESSOR,
APPELLEE

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether a statutory scheme by which a State grants a continuing tax exemption to veterans who became residents of the State before a specified, fixed date but permanently denies such an exemption to otherwise qualified veterans who became residents after that date violates the constitutional rights of the newer resident-veterans with respect to equal protection, due process and the right to travel or migrate interstate?

2. Whether a State may, in the context of a tax-related statute, impose a residency requirement which permanently divides citizens of that State into two classes, one of which is perpetually denied a tax benefit which is granted to the other on a continuing basis?

3. Whether, in the distribution of benefits to its resident-veterans, a State may impose, in addition to a bona fide residency requirement, another residency requirement unrelated to residency during the period of military service?

4. Whether there is a violation of State citizenship rights, secured by Section 1 of the 14th Amendment, when a fixed-date residency requirement is used, not as a test of the legitimacy of a claim of citizenship, but rather as a device to perpetually deny equal treatment to newer citizens?

5. Whether, if found invalid, the residency requirement of paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) (as amended) can be severed from the remainder of that statute?

PARTIES TO PROCEEDINGS BELOW

Alvin D. Hooper and Mary N. Hooper were the appellants and the Bernalillo County Assessor was the appellee in the proceedings in the Court of Appeals of the State of New Mexico whose judgment is sought to be reviewed herein.

The New Mexico Taxation and Revenue Department, the American Legion and the Veterans of Foreign Wars were amicus curiae in the proceedings in the Court of Appeals of the State of New Mexico.

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TABLE OF AUTHORITIES

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

Hooper v. Bernalillo County Assessor, 101 N.M. 172, 679 P.2d 840 (Ct. App. 1984), cert. denied, 101 N.M. 77, 678 P.2d 705 (1984).

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

This is an appeal from the Court of Appeals of the State of New Mexico which rejected appellants' challenge to N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) which requires residency in New Mexico prior to May 8, 1976 in order to qualify as a Vietnam-era veteran for purposes of a tax exemption. Appellants challenged that statute as repugnant to their citizenship, equal protection and due process rights secured by Section 1 of the Fourteenth Amendment of the United States Constitution and their constitutionally protected right to travel or migrate interstate. Appellants' challenge to the statute was rejected by the Court of Appeals of New Mexico in a decision and order entered March 22, 1984 (J.S. App. B).

On April 4, 1984, appellants filed with the Supreme Court of New Mexico a timely petition for writ of certiorari to review the decision of the Court of Appeals of New Mexico. N.M. Sup. Ct. R. 28, R. App. Proc. for Civ. Cases & R. Gov. Orig. Proc. in Sup. Ct., Jud. Pamp. 7, Repl. Pamp. 1984. In its decision and order of April 10, 1984 (J.S. App. A), the Supreme Court of New Mexico denied the petition and let stand the decision of the Court of Appeals of New Mexico. Appellants' timely motion for rehearing of that petition (J.S. App. D) was filed with the Supreme Court of New Mexico on April 23, 1984. That motion was not acted upon and was therefore deemed denied by the Supreme Court of New Mexico on May 23, 1984. N.M. Sup. Ct. R. 19, R. App. Proc. for Civ. Cases & R. Gov. Orig. Proc. in Sup. Ct., Jud.

Pamp. 7, Repl. Pamp. 1984.

Appellants' notice of appeal to this Court was filed on July 12, 1984 in the Supreme Court of New Mexico and on July 13, 1984 in the Court of Appeals of the State of New Mexico (J.S. App. E). 28 U.S.C. §2101(c); Sup. Ct. R. 10, 11.

The appeal was docketed in this Court on August 9, 1984. Sup. Ct. R. 12.

This Court noted probable jurisdiction of this case on October 9, 1984.

This Court has jurisdiction under 28 U.S.C. §1257(2) (1982) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A veteran's tax exemption is authorized by article VIII, section 5 of the New Mexico Constitution and is implemented through N.M. Stat. Ann. § 7-37-5 (1978) (as amended). Appellants believe the implementing statute, particularly paragraph C(3)(d) thereof relating to Vietnam-era veterans, offends section 1 of the Fourteenth Amendment to the United States Constitution and the right to travel or migrate interstate which is guaranteed by that Constitution.

These constitutional provisions and statute are set forth in the Jurisdictional Statement, beginning on page 12 thereof.

STATEMENT OF THE CASE

The material facts of this case are simple and undisputed. They are stated in the first two paragraphs of the opinion of the Court of Appeals of New Mexico (J.S. App. B 2-3).

Appellants jointly own real property subject to taxation in Bernalillo County, New Mexico. Appellant, Alvin D. Hooper, served in the armed forces during the specified time period, for a sufficient length of time, and received an honorable discharge as required by N.M. Stat. Ann. § 7-37-5 (1978) (as amended) in order to qualify for a tax exemption as a Vietnam-era veteran. Appellants migrated to and became bona fide residents of New Mexico on August 17, 1981.

Appellants made timely application to the Bernalillo County Assessor

("Assessor") for a veteran's exemption with respect to their 1983 property taxes. This application was denied by the Assessor solely because appellants had not established residency in New Mexico prior to May 8, 1976, as required by paragraph C(3)(d) of N.M. Stat. Ann. § 7-37-5 (1978) in order to qualify as a "veteran."

The Assessor's denial was timely protested and appealed by appellants to the Bernalillo County Valuation Protests Board ("Board") which upheld the Assessor's denial following a hearing (J.S. App. C). N.M. Stat. Ann. § 7-38-24 to -27 (1978) (as amended).

Appellants timely appealed the Assessor's and Board's denials to the Court of Appeals of the State of New Mexico. N.M. Stat. Ann. § 7-38-28 (1978) (as amended). That Court

affirmed the Assessor's and Board's denials and held that the residency requirement of paragraph C(3)(d) of the statute was valid and did not violate appellants' equal protection and due process rights and their right to travel or migrate interstate (J.S. App. B 4, 7, 20).

The Supreme Court of New Mexico denied appellants' timely petition for a writ of certiorari to review the decision of the Court of Appeals of New Mexico (J.S. App. A) and denied their timely motion for rehearing of that petition (J.D. App. D), thereby letting stand the decision and order of the Court of Appeals of New Mexico. Appellants appealed the decision of the Court of Appeals of the State of New Mexico to this Court.

SUMMARY OF ARGUMENT

The fixed-date residency requirement set forth in N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended), which governs property tax exemptions for Vietnam-era veterans, is one of the most discriminatory residency requirements ever examined by this Court. It does not purport to be a test for bona fide residency in New Mexico--that test is contained in paragraph A of the statute and appellants are bona fide residents. This residency requirement instead divides New Mexico resident-veterans into two permanent classes based solely upon date of migration to the State and therefore is nothing more than a blatant attempt by New Mexico to reward its older or earlier resident-veterans and discriminate against its newer resident-veterans in the

distribution of publicly-funded benefits. The Fourteenth Amendment forbids such discriminatory apportionment of state benefits.

This residency requirement creates permanent classes of citizens in New Mexico which have substantially different citizenship rights and benefits based solely upon the date of exercise of the fundamental right to travel or migrate to that State. It is in effect a durational residency requirement of infinite length in that the waiting period for equality under this statute is forever. Perpetually determining a citizen's status based upon the date of exercise of a fundamental right clearly burdens that right and should trigger strict scrutiny of the requirement which creates the burden. The residency requirement

challenged here cannot be justified on any rational basis, much less withstand strict scrutiny. Further, in any balancing of interests, the important individual interests and the national interest in a free and fluid system of interstate movement clearly outweigh any interests of New Mexico in the challenged residency requirement.

The legitimate interests of New Mexico in assisting its citizen-veterans is not challenged nor is that State being challenged regarding its right to classify citizens in accordance with relevant and rational criteria. However, using an arbitrary date to divide its citizens into permanent conflicting classes is not a rational, nor permissible way for New Mexico to express interest in its citizens. Such action by New Mexico is so arbitrary and

unreasonable that it violates the due process and equal protection rights of those citizens disadvantaged by the classification.

New Mexico's freedom with respect to economic and tax legislation does not extend so far as to allow it to disregard fundamental national interests and the constitutional rights of its citizens. Even in tax legislation where no fundamental right is impacted, classifications must still be rational. A classification based on an arbitrary date is not rational.

For these reasons, the Court of Appeals of New Mexico should be reversed and the arbitrary residency requirement here in issue declared invalid and severed from the remainder of the New Mexico statute.

ARGUMENT

I. THE RESIDENCY REQUIREMENT CHALLENGED HEREIN IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE.

Article VIII, section 5 of the Constitution of New Mexico provides that:

> The legislature may exempt from taxation property...of every honorably discharged member of the armed forces of the United States who served in such armed forces during any period in which they were or are engaged in armed conflict under orders of the president of the United States,...in the sum of two thousand dollars ($2,000).

This provision (i) speaks of every honorably discharged veteran, not just a select class, (ii) contemplates service on behalf of the United States, not just New Mexico, and (iii) does not even mention residence.

This constitutional provision is implemented by N.M. Stat. Ann. § 7-37-5 (1978) (as amended), which provides in pertinent part:

> A. Two thousand dollars ($2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran...if the veteran...is a New Mexico resident....
>
> . . . .
>
> C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to...(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

A brief history of these provisions is set forth in Appendix A hereto. It should be noted in this history that a date (May 8, 1975) was first added to paragraph C(3)(d) of the statute in

1981. 1981 N.M. Laws, ch. 187, §1. In 1983, after appellants had filed for the exemption, the statute was amended to substitute the present date of "1976" for "1975." 1983 N.M. Laws, ch. 330, §1. Both the May 8, 1975 and May 8, 1976 dates were designated by the New Mexico Legislature several years after these dates had passed. Thus, from its very conception, the residency requirement in paragraph C(3)(3) was obviously intended to benefit only the earlier or longer-term residents.

The enactment of these residency-date requirements had the immediate effect of dividing Vietnam-era veterans who were already living in and citizens of New Mexico into two permanent classes which received disparate treatment. For example, in 1981 a Vietnam-era veteran who had

migrated to New Mexico on May 7, 1975 suddenly became eligible for a tax exemption. However, the veteran who had migrated to New Mexico on May 8, 1975 was simultaneously told that he was not, and never would be, eligible for the exemption unless the legislature acted further. All veterans who first migrated to New Mexico after the specified date would forever share the second-class citizenship status of those citizen-veterans who had been disadvantaged immediately upon enactment of the residency requirement.

This statute includes two significant features. First, it includes in paragraph A both a requirement for a present bona fide residency and a requirement of veteran status. These requirements are not challenged. Secondly, in paragraph

C(3)(d) the statute arbitrarily adds an additional residency requirement or veteran-status requirement by defining "veteran" in terms of a fixed date (May 8, 1976 for Vietnam-era veterans) which has no real connection to the time period of military service or to the time period of any prior residence in New Mexico. This requirement is challenged herein.

The residence "prior to May 8, 1976" which qualifies one to be a "veteran" could range from a very short period to a long continuous period so long as any part occurred at any time prior to this fixed date. Continuous residence is not required. See 1963-64 Rep. of Att'y Gen. of N.M. 31 (Op. No. 63-13). The qualifying military service could have occurred before, during or after the period of qualifying prior residence.

The veteran who resided in New Mexico for only one week as an infant years ago could immediately qualify for the exemption upon resumption of residence at any time in the future regardless of where he or she had resided before, during or after military service. Thus, contrary to the reasoning of the Court of Appeals of New Mexico, there is no need for a "grace period" immediately following the war for "re-establishing" residence (J.S. App. B 17).

The additional fixed-date residency requirement of May 8, 1976 does not purport to classify or distinguish between veterans and non-veterans as is contemplated in article VIII, section 5 of the New Mexico Constitution. Such classifications or distinctions between veterans and non-veterans are permitted. Regan v. Taxation With

Representation of Washington, 461 U.S. 540, 103 S. Ct. 1997 (1983) (non-veterans organization engaged in lobbying activities properly may be denied a tax exemption status which is granted to veterans organization engaged in similar activities). See, e.g., 38 U.S.C. §101(2) (1982) (defines or distinguishes veterans from non-veterans for purposes of federal benefits). Rather, the fixed date creates arbitrary and permanent classifications of similarly-situated resident-veterans never contemplated in the New Mexico Constitution nor permitted by Section 1 of the Fourteenth Amendment to the United States Constitution.

The New Mexico statute distributes State veterans benefits unequally. There is no dispute that appellant, Alvin D. Hooper, meets all requirements

for a veteran's tax exemption set forth in both the constitutional provision and the statute, with the sole exception of the fixed-date requirement of paragraph C(3)(d) of the statute. (J.S. App. B 2-3). Yet appellant has been denied a benefit which is granted to similarly-situated New Mexico citizens who happened to reside in New Mexico prior to May 8, 1976.

As stated by this Court in Zobel v. Williams, 457 U.S. 55, 60 (1982), in striking down an Alaska dividend-distribution scheme which apportioned the amount of the dividend on length of residence:

> When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it

makes rationally furthers a legitimate State purpose.

The provision challenged herein fails to survive even this minimum scrutiny.

A. REWARDING A SELECT CLASS OF VETERANS IN RECOGNITION OF PAST CONTRIBUTIONS IS NOT A LEGITIMATE STATE PURPOSE.

Only two state purposes or objectives were relied upon by the Court of Appeals of New Mexico to sustain the validity of the classification created by N.M. Stat. Ann. § 7-37-5C(3)(d). One purpose was stated as "[a] state's interest in expressing gratitude and rewarding its own citizens for honorable military service...." (J.S. App. B 15). (Also expressed as "a plan to reward New Mexico veterans...." (J.S. App. B 12)). By denying the tax exemption benefit to newer residents such as appellants, New Mexico clearly

is not "expressing gratitude and rewarding" that class of "its own citizens." Rather, New Mexico is apportioning the benefit only "to a small class of New Mexico veteran residents." (J.S. App. B 18-19). "Its own citizens" has been redefined by New Mexico as its earlier citizens whether or not they have even remained citizens of the State. Thus, the stated purpose dissolves into nothing more than a desire to reward a select class of earlier New Mexico residents for past contributions. That objective is not acceptable for at least two reasons.

First, this Court has specifically rejected a "past contributions" justification for the apportionment of benefits. In Zobel v. Williams, 457 U.S. 55, 63 (1982), this Court stated:

> The last of the State's objectives--to reward citizens for past contributions--...is not a legitimate state purpose. A similar "past contributions" argument was made and rejected in Shapiro v. Thompson, 394 U.S. at 632-633....

See id. at 68 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining, citing Vlandis v. Kline, 412 U.S. 441, 450 n. 6 (1973)).

The fact that the past contribution happens to be military service in no way changes the foregoing prohibition. This is particularly true when the past contributions of only a select group of earlier resident-veterans is recognized. As elaborated upon by the Court in Strong v. Collatos, 593 F.2d 420, 422 (1st Cir. 1979) (affirming a lower court's striking down of a Massachusetts three-year durational residency requirement for receipt of veteran's benefits):

Appellants' primary position is that the statute is part of a unique and elaborate state program of benefits to veterans reflecting a legitimate desire to reward Massachusetts citizens who have served their country in the armed forces. They urge that, since the program is a reward to a certain finite group, it is distinguishable from the Shapiro type of benefits which are needed for the basic necessities of life.

This argument simply does not wash....

. . . .

It is difficult to understand how these benefits are in any meaningful way distinguishable from the welfare aid involved in Shapiro. Nor can we conceive why veterans who have served the entire United States, including Massachusetts, are made worthier by waiting three years to become eligible for the benefits. The reward, we assume, is for serving in the armed forces, not for living in Massachusetts....

> What we have here is an attempt by Massachusetts to prefer its own residents...upon a time basis which is entirely arbitrary, and which at most could be said to have

> some relation to the prior contributions made by Massachusetts residents to the Commonwealth. But even if the time periods were not arbitrarily selected, it would not be constitutionally permissible for Massachusetts to make a right or privilege depend upon the mere fact that the recipient was one of Massachusetts' own people.... [Quoting Stevens v. Campbell, 332 F. Supp. 102, 106 (D. Mass. 1971) (three-judge court)].

See also Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971) (applied strict scrutiny test to strike down five-year residency requirement for veteran's preference and reasoned that military service is of general or national interest and a state does not have sufficient special interest to justify favoring its own citizens and penalizing the exercise of the fundamental right to migrate). This reasoning is persuasive with respect to

the challenged New Mexico residency requirement. "The basic predisposition to take care of one's own--and no one else's--is no longer a permissible goal for a state that has joined the federal union." Schafer v. Vest, 680 P.2d 1169, 1171 (Alaska 1984) (per curiam). This predisposition, based upon the provincial thinking that older or earlier residents are somehow more worthy, is the very evil that the equal protection right was intended to proscribe. Cole v. Housing Authority of Newport, 435 F.2d 807, 813 (1st Cir. 1970); Lambert v. Wentworth, 423 A.2d 527, 533 (Me. 1980). Reasoning to the contrary in cases such as Langston v. Levitt, 425 F. Supp. 642 (S.D.N.Y. 1977) (three-judge court) and August v. Bronstein, 369 F. Supp. 190 (S.D.N.Y. 1974) (three-judge court), aff'd, 417

U.S. 901 (1974), which approved preferential treatment of a state's "own veterans" (i.e., veterans whose residency and military service overlapped) is no longer persuasive, if it ever was, in view of Zobel v. Williams, 457 U.S. 55 (1982), and the reasoning of Strong v. Collatos, 593 F.2d 420 (1st Cir. 1979). "[S]ummary affirmance by this Court [in August] is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel, 457 U.S. at 64 n. 13.

Secondly, assuming arguendo that past military service as a resident of New Mexico were otherwise a legitimate and sufficient past contribution, this statute must still fall. This statute requires no connection or overlap between time or date of residency and time or date of military service.

Supra, at 29-30. Accordingly, New Mexico cannot rely on a special nexus between military service and residency to show any rational connection between the residency requirement and the rewarding of "its own citizens for honorable military service...." (J.S. App. B 15).

B. THIS FIXED-DATE RESIDENCY REQUIREMENT IS NOT RATIONALLY RELATED TO THE OBJECTIVE OF ENCOURAGING VETERANS TO SETTLE IN NEW MEXICO.

The Court of Appeals of New Mexico stated that another purpose of the statute was "to reward and encourage veterans to settle in New Mexico...." (J.S. App. B 16). However, the court provided no insight for rationally linking that purpose to this challenged residency requirement. This Court considered and rejected a similar

asserted linkage in Zobel v. Williams, 457 U.S. 55, 61 (1982):

> [C]reating a financial incentive for individuals to establish and maintain Alaska residence...[is] not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.

The incentive of a tax exemption should be equally attractive to all veterans and the denial of the incentive to veterans who had not migrated to New Mexico before May 8, 1976 might be considered an attempt by New Mexico to discourage such migration. Such an attempt should encounter insurmountable constitutional difficulties. Zobel, 457 U.S. at 62 n. 9; Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

This statute has a further fatal flaw with respect to this alleged purpose in that the previously-discussed

history of this challenged fixed-date residency requirement (Appendix A) shows the impossibility of it providing any basis for encouraging veterans to settle in New Mexico. When the New Mexico Legislature chose both the original date of May 8, 1975 and the amended date of May 8, 1976, those dates had long since passed. It is an impossibility to retroactively encourage the doing of an act before a date which has already passed. This is further compelling evidence of the lack of any rational connection between the fixed-date residency requirement and any legitimate state purpose.

C. A DATE OF RESIDENCE BY ITSELF IS NOT A RATIONAL BASIS FOR CLASSIFICATION OF STATE CITIZENS FOR RECEIPT OF BENEFITS.

The right of a state to impose a

requirement of a bona fide residency for receipt of publicly-funded benefits is without question. Martinez v. Bynum, 461 U.S. 321, 103 S. Ct. 1838 (1983) (a Texas statute requiring a bona fide residence in order to obtain tuition-free public school admission upheld). Further, the right of a state to make reasoned distinctions between its citizens based on relevant, neutral characteristics such as need is not challenged. Zobel v. Williams, 457 U.S. 55, 70 (1982) (Brennan J., concurring, with Marshall, Blackmun and Powell, JJ. joining). However, statutory provisions such as N.M. Stat. Ann. § 7-37-5(C)(3)(d) (1978) encounter constitutional prohibitions when they attempt to go further and classify concededly bona fide citizens of the state solely on the basis of an

arbitrary and irrelevnt characteristic such as date or length of residence.

The reasoning underlying the constitutional prohibitions against such classification is amplified in the concurring opinion of Justice Brennan in Zobel v. Williams, 475 U.S. 57, 69 (1982):

> But it is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions.

The foregoing reasoning is equally applicable when the "degrees of citizenship" are based on a date of establishing residence rather than a length of residence. That concurring opinion goes on to state:

> [W]e have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself.

Id. at 70. This reasoning likewise applies to discrimination based on date of residence.

Appellants do not contend that their Fourteenth Amendment citizenship rights require New Mexico to provide veterans tax exemptions in the first place. Instead, appellants simply assert that once New Mexico made that decision, its power to apportion that benefit is limited by Section 1 of the Fourteenth Amendment. This fundamental principle has long been recognized. Justice Miller stated in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873), that "a citizen of the United States

can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." In short, there can be no seniority or caste system insofar as citizenship and the rights associated therewith are concerned. Differences in treatment by a state of its citizens must at least bear a rational relationship to some relevant characteristic such as individual need. Different treatment based on arbitrary and irrelevant criteria is prohibited discrimination. This is particularly true when the disparate treatment is based on an arbitrary residency requirement which implicates the right to travel.

> [I]t is difficult to escape from the recognition that

> underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence, when we adopted the Equal Protection Clause.

Zobel, 457 U.S. at 71 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining). The specification of a date of residence rather than a period or a duration is a difference of form only, not of substance.

This Court in Zobel, 457 U.S. at 65, concluded that "Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then." Simply replacing "Alaska" with "New Mexico" and

"1959" with "May 8, 1976" in this quotation shows just how precisely the reasoning in Zobel applies to this case.

The Supreme Court of Alaska recently invalidated a statute containing a specified or fixed-date residency requirement on the basis that its examination of that statute was controlled by this Court's reasoning in Zobel v. Williams. In Schafer v. Vest, 680 P.2d 1169, 1170 (Alaska 1984) (per curiam), the Court invalidated an Alaska statute establishing a longevity bonus program which paid a monthly cash bonus to state residents who (i) were over 65, (ii) were domiciled in Alaska before it became a state (i.e., January 3, 1959), and (iii) had 25 years of continuous domicile. The reasoning of Chief Justice Burke in his concurring opinion

invalidating the statute is persuasive in this case. He states:

> Persons who were not domiciled in Alaska prior to January 3, 1959, are automatically and forever barred from sharing in the program's monetary benefit. Even those thus qualified must meet the additional requirement of 25 years of continuous domicile. Thus, the program applies only to a select class, for which one qualifies solely on the basis of the date of his or her arrival in Alaska, followed by a prescribed period of continuous domicile. I see no substantial relationship between these requirements and any legitimate state purpose.

Schafer, 680 P.2d at 1172. If New Mexico can automatically and for all time deny a veteran's benefit on the basis of the date of establishing residence, nothing would preclude it from arbitrarily denying access to public facilities, the best schools, public employment or any State-provided benefit on the same basis. It is hard

to imagine anything more destructive to the very fabric of our union and more alien to our fundamental concepts of equality than allowing a state to create such arbitrary and permanent classifications of its citizens.

D. THE SPECIFIED DATE OF RESIDENCY IS COMPLETELY ARBITRARY AND CANNOT BE THE BASIS FOR A RATIONAL CLASSIFICATION OF STATE CITIZENS.

The Court of Appeals of New Mexico concedes that any date chosen for the residency requirement "would be, to some extent, arbitrary...." (J.S. App. B 17). A date which to any extent is arbitrary is not an acceptable basis for classification of citizens. It cannot be both arbitrary and rational.

Even the Supreme Court of New Mexico has stated that classifications based solely on arbitrary dates are not

permissible. In State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944), that court invalidated a New Mexico statute which required a corporation organized before New Mexico became a state to file an annual report not required to be filed by corporations organized after that date. The court reasoned:

> Legislative classification based wholly upon [a] time element when the time selected has no reasonable relation to the object of the legislation has been held unreasonable and arbitrary, and repugnant to the 14th Amendment to the Federal Constitution.

Id. at 25, 145 P.2d at 223. The Court of Appeals of New Mexico failed to follow this precedent. (J.S. App. B 14-15).

New Mexico has no published legislative history to support any alleged purposes of the statutory classification other than those relied

upon by the Court of Appeals of New Mexico. Those purposes have already been discussed and demonstrated as not being legitimate or not being rationally related to the specified date. Supra, at 33-42. Thus, the originally-specified date of May 8, 1975 and the amended date of May 8, 1976 must be taken for what they are--purely arbitrary dates. The arbitrariness of the specified date is further illustrated by the action of the New Mexico Legislature in 1983 when it changed the previously-specified date of May 8, 1975 to May 8, 1976. 1983 N.M. Laws, ch. 330, §1. There cannot be a multitude of rational dates or times for the same purpose. The legislature could just as easily have chosen 1:39 PM on May 8, 1976. That would not be any more arbitrary.

The discriminatory effect of this arbitrary date of May 8, 1976 is graphically illustrated by the previously-mentioned example of two Vietnam-era veterans. Supra, at 27-28. New Mexico's interest in those two resident-veterans cannot rationally be so drastically different. The State's desire to reward its veterans cannot rationally be so dependent upon one day's difference in residency especially when the critical day has passed several years before it was chosen by the legislature. This is arbitrariness in its most brazen form.

II. THIS RESIDENCY REQUIREMENT IS IN EFFECT A PERPETUAL DURATIONAL REQUIREMENT WHICH CANNOT WITHSTAND THE REQUIRED STRICT SCRUTINY.

As discussed, the residency requirement of N.M. Stat. Ann.

§ 7-37-5C(3)(d) (1978) (as amended) cannot pass even the minimum rationality test. Assuming arguendo that it could pass that minimum test, that is not enough. Because of its impact on the fundamental right to migrate, the requirement should withstand strict scrutiny before it could be found valid. This requirement clearly cannot withstand that scrutiny.

A. THE SPECIFIED DATE IS IN EFFECT A DURATIONAL REQUIREMENT OF INFINITE LENGTH AND IS ONE OF THE MOST OPPRESSIVE RESIDENCY REQUIREMENTS EVER EXAMINED BY THIS COURT.

An examination must be made of the substance or effect as well as the form of the fixed-date requirement set forth in N.M. Stat. Ann. § 7-37-5C(3)(d) (1978). For Vietnam-era veterans migrating to New Mexico after May 7, 1976, that fixed-date requirement

operates exactly as a residency requirement of unlimited or infinite duration. Its effect is to divide bona fide resident-veterans into two permanent classes based solely on date of migration to New Mexico. Members of the later-arrriving class cannot hope to ever satisfy the residency requirement and attain equality with the members of the earlier-arriving class. Stated differently, the waiting period for equality under this statute is forever.

It would appear self-evident that a Vietnam-era veteran moving to New Mexico after May 7, 1976 would, if given a choice, prefer a ten- or even twenty-year durational residency requirement over a residency requirement which forever bars him or her from achieving equality with those similarly-situated veterans who arrived before that date.

Even with very long but finite durational requirements, the veteran can hope to one day achieve equality. There can be no such hope under this statute because it forever closes the door to "veteran" status for anyone whose residency is established after this fixed point in time, now more than eight years past. There seems little doubt that a ten- or twenty-year durational requirement would be invalid under such circumstances. It is less doubtful that a residency requirement which is even more onerous than these invalid durational residency requirements is also invalid.

In Zobel v. Williams, 457 U.S. 55 (1982), this Court struck down an Alaska statutory scheme which distributed a dividend to its citizens in varying amounts based upon the length or date of

residency of the recipients. This Court held that such a scheme of classifying state citizens did not meet the minimal rational basis test. Id. at 65. That invalid scheme was in effect the same as the scheme being challenged herein in that it divided the citizens of Alaska into permanent classes in which members of later-arriving classes could never achieve equality with the members of earlier-arriving classes. That is in essence an infinite or perpetual durational residency requirement in that the waiting period for equality is forever. It makes little difference to the person denied equality whether the invalid basis for the denial is expressed in terms of a fixed date or an unreasonable period of time.

The New Mexico statute differs from the invalid Alaska statute in that it

creates fewer classes and it either grants or denies the entire benefit. These distinctions merely sharpen the focus on the discriminatory effect of the New Mexico statute.

The effect of the residency requirement in denying a tax exemption to Vietnam-era veterans migrating to New Mexico on or after May 8, 1976 is neither temporary nor insignificant. It results in a year-after-year, perpetual denial of equality with respect to a substantial annual benefit which is granted to other similarly-situated veterans. It is hard to imagine a residency requirement which more blatantly challenges the fundamental right of free interstate migration or the concept of equality of citizenship set forth in Section 1 of the Fourteenth Amendment.

B. THIS RESIDENCY REQUIREMENT OF PERPETUAL DURATION IMPOSES A PENALTY ON THE FUNDAMENTAL RIGHT TO TRAVEL OR MIGRATE INTERSTATE AND MUST BE SUBJECTED TO STRICT SCRUTINY.

The federal or national interest in a free and fluid system of interstate travel and movement and the individual "right to travel" associated therewith have long been recognized even though their source is subject to debate. Zobel v. Williams, 457 U.S. 55, 60 n. 6 (1982); id. at 66-67 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining); id. at 72-73, 79-81 (O'Connor, J., concurring in the judgment). See Jones v. Helms, 452 U.S. 412, 417-19 and nn. 12 and 13 (1981); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 757-59 (1966). The "right to travel" has two aspects--a more general right to travel to and through a

state and a more specific right to enter and establish residency within a state. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). These two aspects are often merged and undifferentiated. Both are fundamental to our union and a threat to one must be considered a threat to the other.

The essence of both aspects of the "right to travel" is stated in Zobel, 457 U.S. at 60 n. 6:

> In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents.

In this case it is clear that Vietnam-era veterans who have exercised their fundamental right to migrate to

and become citizens of New Mexico on or after May 8, 1976, are disadvantaged with respect to, and are treated differently from, longer-term residents (i.e., those simiarly-situated veterans who moved to New Mexico before May 8, 1976) solely because of the date on which they exercised their fundamental right. The citizenship right of the newcomers or later-arriving veterans is forever less valuable than that of the earlier resident-veterans or those arriving before May 8, 1976. A clearer case of a burden or penalty relating to the exercise of the right to travel would be difficult to imagine. See Cole v. Housing Authority of Newport, 435 F.2d 807, 810-11 (1st Cir. 1970).

This Court has held that no actual deterrence to travel or migration is required before a residency requirement

will be considered as penalizing or burdening the right to travel. As stated in Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972), any argument that actual deterrence is required "represents a fundamental misunderstanding of the law.... Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence." See Memorial Hospital v. Maricopa County, 415 U.S. 250, 257-58 (1974). The penalty results from how the newcomer is treated once he arrives, not on whether he was actually deterred. If the new resident is disadvantaged with respect to prior residents, the new resident is being penalized.

The classification of admittedly

bona fide resident-veterans into two classes, one of which is permanently disadvantaged or penalized on the basis of the date of exercise of the fundamental right to travel, can only be justified if there is a compelling state interest in the classification. Shapiro v. Thompson, 394 U.S. 618, 634 (1969), states that "any classification which serves to penalize the exercise of that right [right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." (Emphasis in original). See Memorial Hospital v. Maricopa County, 415 U.S. 250, 258 (1974); Dunn v. Blumstein, 405 U.S. 330, 339 (1972).

In Zobel v. Williams, 457 U.S. 55 (1982), this Court found that the residency requirement of the Alaska dividend statute did not even meet the

minimal rational purpose test and thus no decision regarding the appropriateness of enhanced or strict scrutiny was required. Zobel, 457 U.S. at 60, 65. However, four concurring Justices leave no doubt that "where the 'right to travel' is involved...it will trigger intensified equal protection scrutiny." Zobel, 457 U.S. at 66 n. 1 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining).

The New Mexico Court of Appeals held that appellants' right to travel has not been unconstitutionally implicated because the benefit involved here is not a fundamental interest or basic necessity of life. (J.S. App. B 7-8). Appellants have found no support for such reasoning in this Court's recent decisions invalidating residency requirements. On the contrary, this

Court in Zobel v. Williams, 457 U.S. at 64 n. 11, appears to disapprove any such rationale. The concurring opinion goes even further and specifically states that the right to travel "is clearly, though indirectly, affected by the Alaska dividend-distribution law...." Zobel, 457 U.S. at 66 (Brennan, J., concurring, with Marshall, Blackmun and Powell, JJ. joining). Yet, there was no finding in Zobel that the dividend distribution was a fundamental right or basic necessity of life, and its monetary value did not appear significantly different than that of the veterans tax exemption involved herein. Further, appellants in Zobel had been residents of Alaska for about two years and clearly had not been deterred from migrating there. Classifications are subject to strict scrutiny, not because

of the associated benefit, but because they "impinge[d] upon the fundamental right of interstate movement." Graham v. Richardson, 403 U.S. 365, 375 (1971). Accord Barnes v. Board of Trustees, Michigan Veterans Trust Fund, 369 F. Supp. 1327, 1335 (W.D. Mich. 1973) (three-judge court). Surely the State of New Mexico would not suggest that this Court should countenance "minor" encroachments on constitutionally-protected rights.

Even assuming arguendo that deprivation of a substantial right or benefit were required before strict scrutiny became applicable, such a benefit is involved in this case. A benefit which is of sufficient importance to be specifically authorized in the State Constitution, N.M. Const. art. VIII, §5, and which can amount to

several thousand dollars over a lifetime is clearly significant to most citizens.

The right to travel and migrate freely must, if it means anything, mandate that a new citizen of a state must within some rational time after arrival be treated equally with earlier residents. Permanent distinctions between citizens based solely on the time of exercising the fundamental right to migrate to and establish citizenship within New Mexico must approach per se invalidity without reference to the underlying benefit involved.

As previously discussed, the alleged purposes of the New Mexico statute are not legitimate or are not rationally related to the classification produced by the challenged residency requirement in N.M. Stat. Ann. § 7-37-5C(3)(d) (1978). Supra, at 33-42. A fortiori,

there can be no compelling state interest in or need for that residency requirement. Any additional purpose brought forth at this stage to justify a compelling state interest can be nothing more than an afterthought not entitled to any weight. Any legitimate purpose of New Mexico can be achieved by means far less violative of individual rights than the use of this oppressive residency requirement.

In the absence of a compelling state interest, this residency requirement cannot withstand the strict scrutiny mandated because of the burden it places on the right to travel. Thus, this requirement is invalid.

C. THIS COURT HAS NEVER APPROVED A RESIDENCY REQUIREMENT AS ONEROUS AS THIS REQUIREMENT.

As previously discussed, the

requirement of a bona fide residency appears permissible in most contexts, including the distribution of state benefits and the exercise of basic rights such as voting. Martinez v. Bynum, 461 U.S. 321, 103 S. Ct. 1838 (1983); Dunn v. Blumstein, 405 U.S. 330 (1972). However, in the absence of some compelling or vital state interest, this Court has struck down residency requirements more stringent than those required to insure that a bona fide residence does in fact exist. In Dunn v. Blumstein, this Court invalidated a Tennessee law requiring a one-year residency to vote.

In the context of distribution of state benefits, this Court has also invalidated durational residency rquirements of one year as unnecessarily long to assure a bona fide residence and

as having an impermissible impact on the right to migrate. In Shapiro v. Thompson, 394 U.S. 618 (1969), this Court struck down a one-year residency requirement for public assistance benefits. In Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), a one-year residency requirement for public, non-emergency medical assistance was invalidated. Finally, in Zobel v. Williams, 457 U.S. 55 (1982), this Court invalidated a residency requirement which was different from a typical durational residency requirement but which was more stringent than required to verify a bona fide residency.

In certain situations involving significant state interests or where the facts relating to a claim of residency may be ambiguous or difficult to ascertain, states have been allowed to

impose an additional period of time in which to test the bona fides of a claim of residence. Even in these cases, the additional test period for residency has been limited to one year. Starnes v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) (three-judge court), aff'd, 401 U.S. 985 (1971) (let stand a one-year residency requirement as a test of bona fide residence in connection with state university tuition). See also Vlandis v. Kline, 412 U.S. 441, 452-53 (1973) (invalidated an irrebuttable presumption regarding nonresidency but spoke favorably of a reasonable durational residency by which to determine the bona fides of a residency claim for university tuition purposes). In Sosna v. Iowa, 419 U.S. 393 (1975), a one-year durational residency requirement for access to divorce courts was upheld

because of the significant state interests such as preventing collateral attacks in other states on divorce decrees handed down by the Iowa courts. This Court appeared to consider the one-year residency requirement as an assurance or guarantee of the bona fides of the claim of residence rather than a separate residency requirement as is involved in this case. Id. at 408-409.

Only in rare cases has this Court approved a residency requirement which clearly goes beyond any requirements needed for establishing the bona fides of a claim for citizenship or residence. In Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973) (three-judge court), aff'd, 414 U.S. 802 (1973), this Court let stand a seven-year citizenship requirement to run for governor. A state unquestionably has a vital or

compelling interest in the qualifications of its highest public official. Accord Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974) (three-judge court), aff'd, 420 U.S. 958 (1975) (seven-year residency requirement to run for state senate upheld).

Appellants have found no decision in which this Court has approved a residency requirement of perpetual duration such as the one challenged herein. A state interest important enough to justify the imposition of such an onerous requirement does not readily come to mind.

III. THIS RESIDENCY REQUIREMENT IS ANALOGOUS TO AN IRREBUTTABLE PRESUMPTION OF NONRESIDENCY AND VIOLATES DUE PROCESS RIGHTS.

In Vlandis v. Kline, 412 U.S. 441 (1973), this Court struck down, as

violative of Fourteenth Amendment due process rights, a Connecticut statute which created a permanent and irrebuttable presumption that an unmarried student who was a nonresident for any part of the one-year period prior to the time of application for admission to a state university remained a nonresident throughout his or her enrollment. There was a similar irrebuttable presumption for married students based on such student's address at the time of application for admission.

This challenged residency requirement of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) produces a similar result. Upon arrival in New Mexico, a Vietnam-era veteran is "assigned" a status by that statute insofar as eligibility for a tax exemption is concerned. That status is

permanent and irrebuttable. The veteran is either granted the benefit on a continuing basis or forever denied the benefit based on that initial status. Nothing can be done to change that status. It matters little to affected veterans that the requirement is not officially labeled as a permanent and irrebuttable presumption. The effect is what counts.

One of the alleged purposes of the veterans tax exemption statute is "to reward New Mexico veterans...." (J.S. App. B 12). However, New Mexico's permanent and irrebuttable presumption of non-veteran status, as defined in subparagraph C(3)(d) of the statute, for all veterans who migrate to New Mexico after May 7, 1976, insures that the State purpose is not met. That presumption instead insures that some

bona fide New Mexico veterans, such as appellant, are not rewarded and never will be regardless of how long they remain citizens of New Mexico. Vlandis, 412 U.S. at 449.

The division between due process analysis and equal protection analysis is not sharp. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In many cases, equal protection analysis may be "no more than substantive due process by another name." Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring in the judgment). See McCoy, Recent Equal Protection Decisions--Fundamental Right to Travel or "Newcomers" as a Suspect Class?, 28 Vand. L. Rev. 987, 992-93 (1975). For example, in Carrington v. Rash, 380 U.S. 89 (1965), this Court invalidated, as violative of the Equal Protection Clause

of the United States Constitution, a provision of the Texas Constitution which created an irrebuttable presumption that a serviceman who moved to Texas during his military service remained a nonresident for purposes of voting so long as he remained a member of the armed forces. The rationale in Carrington seems quite analogous to that used in Vlandis v. Kline, 412 U.S. 441 (1973), which was decided on due process grounds. Both equal protection and due process place limits on arbitrary, irrational and discriminatory legislation. Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075, 1080 (M.D. Fla. 1978).

Under either analysis, the arbitrary and discriminatory residency requirement here in issue would fail.

IV. THE INVOLVEMENT OF A TAX BENEFIT DOES NOT GIVE NEW MEXICO THE POWER TO IGNORE FUNDAMENTAL RIGHTS.

The New Mexico Court of Appeals seemed to believe that because this statute involves a tax benefit, the State has substantial freedom to disregard the rights of its citizens in formulating classifications. (J.S. App. B 10, 19). That is not so. Although this Court has spoken of increased legislative freedom in taxation and economic legislation, such freedom is not without limits. In Regan v. Taxation With Representation of Washington, 461 U.S. 540, 103 S. Ct. 1997 (1983), this Court upheld a section of the Internal Revenue Code which denied a tax exemption status to certain nonprofit organizations engaged in lobbying activities even though another section of the Code granted that status

to veterans organizations engaged in similar activities. This Court stated that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." Regan, 461 U.S. at ___, 103 S. Ct. at 2002. However, this Court also clearly cautioned that "[s]tatutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right...." Regan, 461 U.S. at ___, 103 S. Ct. at 2002. Thus, a state certainly does not have a blank check regarding classifications in tax statutes.

Regan did not involve a residency requirement which burdened the right to travel; nor did it involve any other classification scheme which impacted a fundamental right. Thus, only a rational basis was required for the tax

classification therein. Since the New Mexico statute does impact the fundamental right to travel, it must withstand a "higher level of scrutiny."

An examination of other cases upholding a legislative freedom in economic or tax matters reveals that none also involved a classification of people based solely upon a residency requirement which implicates fundamental individual rights. See New Orleans v. Dukes, 427 U.S. 297 (1976) (regulation of pushcart food vendors); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (classifications of individual-owned and corporate-owned personal property); Madden v. Kentucky, 309 U.S. 83 (1940) (classifications of bank deposits). Classifying organizations, or property, or sources of income for economic or tax purposes is vastly

different than classifying admittedly bona fide citizens solely on the basis of their date of residency. The latter situation implicates the fundamental rights of the affected citizens and the State can show absolutely no authority for ignoring those rights in economic or tax legislation or any other situation. To allow such a cavalier disregard of constitutional rights would invite states to categorize offending statutes as tax or economic statutes.

The distribution scheme examined in Zobel v. Williams, 457 U.S. 55 (1982), appears to be in the nature of economic regulation. Yet this Court did not hesitate to invalidate that scheme because of its impact on fundamental rights. Also, this Court raised doubts on any alleged legislative freedom to use residency requirements for

classification purposes in tax legislation when it questions whether states could "impose different taxes based on length of residence[?]." Zobel, 457 U.S. at 64.

In the case of Williams v. Zobel, 619 P.2d 422 (Alaska 1980), a companion case in the Alaska courts to Zobel v. Williams, 457 U.S. 55 (1982), the Supreme Court of Alaska affirmed the invalidity of a statute which conditioned exemptions for state income taxes on dates or duration of residency. The Alaska Supreme Court clearly held that constitutional rights must still be respected even though the legislation deals with taxes. As noted in Zobel v. Williams, 457 U.S. at 58 n. 2, the Alaska Supreme Court held that varying tax exemptions on the basis of different residencies could "be

perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." Labeling a statute as a tax measure gives the State no right to ignore that fundamental right.

In Lambert v. Wentworth, 423 A.2d 527 (Me. 1980), and Osterndorf v. Turner, 426 So. 2d 539 (Fla. 1982), the highest courts in Maine and Florida similarly invalidated tax exemption provisions based on durational residency requirements. Thus, it is clear that other courts do not accord the legislature the power to disregard the constitutional rights of individuals in the name of tax legislation. Neither should the courts of New Mexico allow the legislature to do so.

Assuming arguendo that no fundamental individual right is impacted by

a classification set forth in an economic or tax statute, the classification must still be rationally related to a legitimate state interest. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). It has already been demonstrated that the residency requirement in this New Mexico statute has no rational relation to any legitimate state purpose. Supra, at 33-42. Thus, this statute is invalid even under the minimum rationality test for tax or economic legislation.

V. THE INVALID RESIDENCY REQUIREMENT CAN AND SHOULD BE EXCISED FROM THE REMAINDER OF THE STATUTE BY THIS COURT.

Paragraph A of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) requires a bona fide residency which is not in issue here. In view of the decision of the Court of Appeals of New

Mexico that the additional fixed-date residency requirement of paragraph C(3)(d) challenged herein is also valid, no decision was rendered on the severability of that requirement from the remainder of the statute.

In the event this Court agrees that this additional residency requirement is invalid, the Court should go further and rule that the offending requirement be severed from the remainder of the statute, thereby leaving the remainder operative. Such action is within the power of this Court and its exercise would foster judicial economy and would protect appellants from further protracted and expensive enforcement of their legitimate rights.

Whether the residency requirement of N.M. Stat. Ann. § 7-37-5C(3)(d) (1978), if found invalid, can be severed from

the remainder of the statute, leaving that remainder operative, should be determined by New Mexico law. Stevens v. Campbell, 332 F. Supp. 102, 107 (D. Mass. 1971) (three-judge court). However, regardless of whether New Mexico or federal law is applied, the answer is the same. The invalid residency requirement clearly may be severed from the remainder of the statute.

In New Mexico, the three-pronged test for severability of an invalid portion of a statute is set forth in State v. Spearman, 84 N.M. 366, 368, 503 P.2d 649, 651 (Ct. App. 1972), as follows:

> First, the invalid portion must be able to be separated from the other portions without impairing their effect. Second, the legislative purpose expressed in the valid portion

> of the act must be able to be given effect without the invalid portion. And, thirdly, it cannot be said, on a consideration of the whole act, that the legislature would not have passed the valid part if it had known that the objectional part was invalid.

These tests are met in this case and thus excision is appropriate.

This Court has spoken in similar terms on severabiity of invalid parts of a statute. In Champlin Rfg. Co. v. Commission, 286 U.S. 210, 234 (1932), this Court stated:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See INS v. Chadha, 462 U.S. 919, ___, 103 S. Ct. 2764, 2774 (1983); Buckley v.

Valeo, 424 U.S. 1, 108-109 (1976).

The history of this challenged, fixed-date residency requirement shows that it was added only recently, long after the statute granting an exemption to Vietnam-era veterans was originally enacted. Appendix A. The statute without this challenged requirement fully implements the constitutional provision for the exemption. N.M. Const. art. VIII, §5. This residency requirement is clearly not an essential element of the statute. Thus, under either state or federal precedent, paragraph C(3)(d) may be severed from the remainder of N.M. Stat. Ann. § 7-37-5 and the remainder of that statute left operative.

CONCLUSION

The residency requirement here in issue, which permanently relegates appellants and all similarly-situated veterans who migrated to New Mexico after May 7, 1976 to the status of second-class or less worthy citizens, is incompatible with the constitutional guarantees of equality of citizenship, due process and freedom of interstate migration.

Accordingly, appellants respectfully request this Court:

(1) To reverse the decision and order of the Court of Appeals of New Mexico;

(2) To find N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (as amended) unconstitutional and to order the severance of this part from the remainder of the

statute;

(3) To order that appellants retroactively be granted a veteran's exemption in the amount of $2,000;

(4) To order repayment, with interest, of excess taxes paid by appellants on account of the denial of their claim for a veteran's exemption;

(5) For an award of costs of this appeal and reasonable attorneys' fees; and

(6) Such other relief as this Court shall consider just and appropriate.

Respectfully submitted,

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APPENDIX A

HISTORY OF PROVISIONS OF N.M. STAT. ANN. § 7-37-5 RELATING TO VIETNAM-ERA VETERANS

The tax exemption relating to Vietnam-era veterans was first enacted in 1973, effective January 1, 1975, as part of a statute covering all veterans. This statute required the veteran to have been a New Mexico resident prior to entering service from New Mexico and to have received a campaign medal for services in Vietnam during the period from August 5, 1964 to the official end of the conflict. It did not require residency in New Mexico at the time of claiming the exemption. 1973 N.M. Laws, ch. 258, §38 (codified as N.M. Stat. Ann. § 72-30-5 (1953) (recompiled as N.M. Stat. Ann. § 7-37-5 (1978)). Section 156 of this same law repealed the prior veterans exemption

statute, N.M. Stat. Ann. § 72-1-11 to -20.1 (1953) (as amended), which only covered veterans of earlier wars.

In 1975, the statute was amended (i) to more explicitly require entry into service from New Mexico and (ii) to delete the requirement for service in Vietnam and instead to require service during the period August 5, 1964 through January 1, 1974. This act (approved February 27, 1975) took effect immediately. 1975 N.M. Laws, ch. 3, §1. A subsequent amendment to paragraph A of the statute required residence in New Mexico at the time of claiming the exemption for 1976 and subsequent tax years. 1975 N.M. Laws, ch. 77, §1.

Amendments in 1977 clarified paragraph A to specifically include community or joint property but did not affect the provisions pertinent here.

1977 N.M. Laws, ch. 140, §1 and ch. 168, §1.

In 1981, the statute was amended, effective for tax years beginning on or after January 1, 1982, (i) to delete the requirements of residency in New Mexico prior to entering the service and entry into such service from New Mexico and (ii) to require the veteran to have been a resident of New Mexico prior to May 8, 1975 and to have served during the Vietnam conflict. 1981 N.M. Laws, ch. 187, §1. In 1983, after appellants had filed for the exemption, the statute was again amended to substitute "1976" for "1975." 1983 N.M. Laws, ch. 330, §1. Both dates are equally discriminatory with respect to appellants. The 1983 law was captioned as an amendment "to enlarge the period during which a Vietnam veteran may qualify for an

exemption from property tax."

The pertinent statutory language corresponding to the above history is set forth below.

I. Pertinent provisions of N.M. Stat. Ann. § 72-30-5 (1953) as originally enacted in 1973. 1973 N.M. Laws, ch. 258, §38.

> A. Two thousand dollars ($2,000) of the taxable value of property subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse, whether or not the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.
>
> . . . .
>
> C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were

engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) entering the armed services from New Mexico and was awarded a Vietnam campaign medal for services in Vietnam during the period from August 5, 1964, to the official termination date of the Vietnam conflict.

. . . .

II. Pertinent provisions of N.M. Stat. Ann. § 72-30-5 (1953) as amended in 1975. 1975 N.M. Laws, ch. 3, §1.

(Paragraph A was not amended.)

. . . .

C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) entering the armed services, entered the armed services from New Mexico and served on active duty at any time during the period from August 5, 1964 through January 1, 1974.

. . . .

III. Pertinent provisions of N.M. Stat. Ann. § 72-30-5 (1953) as further amended in 1975. 1975 N.M. Laws, ch. 77, §1.

> A. Two thousand dollars ($2,000) of the taxable value of property subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse, if the veteran or surviving spouse is a New Mexico resident....
>
> . . . .
>
> (Paragraph C was not amended.)
>
> . . . .

IV. Pertinent provisions of N.M. Stat. Ann. § 7-37-5 (1978) as recompiled from N.M. Stat. Ann. § 72-30-5 (1953) (as Amended).

> A. Two thousand dollars ($2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse, if the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.
>
> . . . .

...(3) was a New Mexico resident prior to: ...(d) entering the armed services, entered the armed services from New Mexico and served on active duty at any time during the period from August 5, 1964 through January 1, 1974.

V. Pertinent provisions of N.M. Stat. Ann. § 7-37-5 (1978) as amended in 1981. 1981 N.M. Laws, ch. 187, §1.

(Paragraph A was not amended.)

. . . .

C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) May 8, 1975, if the period of armed conflict during which the person served was the Vietnam conflict.

. . . .

VI. Pertinent provisions of N.M. Stat. Ann. § 7-37-5 (1978) as amended in 1983. 1983 N.M. Laws, ch. 330, §1.

(Paragraph A was not amended.)

. . . .

C. As used in this section, "veteran" means an individual who: (1) has been honorably discharged from membership in the armed forces of the United States; (2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and (3) was a New Mexico resident prior to: ...(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

. . . .